Captain Rudolph Adrian Joseph (also known as Rudolph Adrian Joseph) v Malaysian Airline System Bhd & Anor (CIMB Bank Bhd, garnishee) (No 1)

HIGH COURT (KUCHING) — SUIT NO 22–86 OF 2007-II
ABDUL AZIZ ABD RAHIM J
25 FEBRUARY 2008

Civil Procedure — Judgments and orders — Consent judgment — Two consent judgments — Second consent judgment varied terms in first consent judgment — Whether court functus officio after making first consent order — Whether second consent could be made if both parties consented

Civil Procedure — Stay of execution of judgment — Application for — Application to stay all proceedings — Whether filing of appeal a ground for granting of stay — Courts of Judicature Act 1964 s 57

The first defendant sought an order for stay of all the execution of proceedings to enforce the garnishee order absolute dated 11 January 2008 pending the disposal of the first defendant's appeal against it. The grounds in support were, inter alia: (i) the first defendant had filed an appeal in the Court of Appeal against the garnishee order absolute; (ii) the plaintiff/judgment creditor was unemployed and did not have a source of income; (iii) there was a real danger that the money paid to the plaintiff/judgment creditor would be dissipated; (iv) the first defendant had a strong and stable financial standing and was able to satisfy any judgment or order of the court given in favour of the plaintiff; (v) there were special circumstances to justify the grant of the stay order of execution. In arguing special circumstances, the first defendant pointed out that the second consent judgment contained new or additional or alternative orders, in particular order (6) for the payment of back wages until 2012. He submitted that this should not be the case as the first consent judgment had been drawn up and perfected; and in the first consent judgment there was no order or judgment for back wages for the entire period of contract up to 2012 which entitled the plaintiff to full wages for the next five years without having to work for it. It further argued that the court was functus officio after the first consent judgment and that there was very limited jurisdiction to grant reinstatement or damages at common law. It was argued that if the plaintiff had been wrongfully dismissed and the plaintiff had sued in damages at common law

then the quantum was limited to the pay which would have been earned by the plaintiff had the proper period of notice been given.

Held, dismissing the application:

(1) The law as to stay of proceedings or execution is too well known to require any citation of any authorities. The law may be briefly stated that the filing of an appeal is not a ground for the granting of the stay: s 57 of the Courts of Judicature Act 1964. The applicant must show special circumstances and that special circumstances must relate to the enforcement of the judgment (see para 9); *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 followed.

(2) The court was functus officio after making the first consent order and such order could not be varied or altered except for limited purpose under the slip rule. However, the principle only applied in cases where one party opposed to the application to amend or alter the judgment. In this instant case, the first defendant had consented to the variation or deemed to have consented to it because the first defendant did not object to the application or filed any affidavit in opposition to oppose it. On the facts, the first defendant had already agreed to the reinstatement of the plaintiff on the terms stated in the two consent judgments and had also agreed to the alternative order as to the payment of back wages in the event the first defendant failed to comply with the terms of the judgments as to the reinstatement (see paras 11–12).

(3) Further, the court was also satisfied that there was no compliance by the first defendant despite the fact that there had been discussions between the plaintiff's counsel and the first defendant's advocates as to how the offer letter to the plaintiff should be drawn up to incorporate the terms of the consent order, after the plaintiff had obtained the second consent judgment (see para 13).

[Bahasa Malaysia summary

Defendan pertama memohon perintah penggantungan terhadap kesemua pelaksanaan prosiding bagi menguatkuasakan perintah mutlak garnisan bertarikh 11 Januari 2008 sementara menunggu penyelesaian rayuan defendan pertama terhadapnya. Alasan-alasan sokongan, antara lain, adalah: (i) defendan pertama telah memfailkan rayuan di Mahkamah Rayuan terhadap perintah mutlak garnisan; (ii) plaintif/pemiutang penghakiman tidak bekerja dan tidak mempunyai sumber pendapatan; (iii) terdapat bahaya

sebenar bahawa wang yang dibayar kepada plaintif/pemiutang penghakiman akan dilesapkan; (iv) defendan pertama mempunyai kedudukan kewangan yang kukuh dan stabil dan mampu memenuhi penghakiman atau perintah pelaksanaan tersebut. Dalam menghujah keadaan-keadaan istimewa, defendan pertama menegaskan bahawa penghakiman persetujuan kedua mengandungi perintah-perintah baru atau tambahan atau alternatif, khususnya perintah (6) untuk bayaran gaji tertunggak sehingga 2012. Ia menghujah bahawa ini tidak patut berlaku kerana penghakiman persetujuan pertama telah dibuat dan diperbaiki; dan dalam penghakiman persetujuan pertama tiada perintah atau penghakiman untuk gaji tertunggak bagi keseluruhan tempoh kontrak sehingga 2012 yang memberi hak kepada plaintif untuk mendapat gaji penuh untuk lima tahun seterusnya (sehingga 26 Januari 2012) tanpa perlu bekerja untuknya. Ia selanjutnya berhujah bahawa mahkamah adalah functus officio selepas penghakiman persetujuan pertama dan bahawa terdapat bidang kuasa terhad untuk membenarkan pengembalian kedudukan jawatan atau ganti rugi dalam *common law*. Adalah dihujahkan bahawa jika plaintif telah dipecat secara salah dan plaintif telah menyaman untuk ganti rugi dalam *common law* maka kuantum terhad untuk bayaran yang patut diperoleh oleh plaintif jika tempoh notis sewajar telah diberikan.

Diputuskan, menolak permohonan:

(1) Undang-undang untuk penggantungan prosiding atau pelaksanaan jelas memerlukan rujukan autoriti-autoriti. Undang-undang tersebut secara ringkasnya menyatakan bahawa pemfailan suatu rayuan bukan alasan untuk membenarkan penggantungan: s 57 Akta Mahkamah Kehakiman 1964. Pemohon hendaklah menunjukkan keadaan-keadaan istimewa dan bahawa keadaan-keadaan istimewa tersebut hendaklah berkait dengan penguatkuasaan penghakiman (lihat perenggan 9); *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 dan *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 diikut.

(2) Mahkamah adalah functus officio selepas membuat perintah persetujuan pertama dan perintah sedemikian tidak boleh diubah atau dipinda kecuali untuk tujuan yang terbatas di bawah kaedah kesilapan. Walau bagaimanapun prinsip tersebut hanya terpakai dalam kes-kes di mana satu pihak menentang apa-apa permohonan untuk meminda atau mengubah penghakiman atau perintah tersebut. Dalam kes ini, defendan pertama telah bersetuju terhadap pengubahan tersebut atau dianggap telah bersetuju terhadapnya kerana defendan pertama tidak membantah terhadap permohonan tersebut atau memfailkan apa-apa afidavit bantahan untuk membantahnya. Atas fakta, defendan pertama

telahpun bersetuju terhadap pengembalian kedudukan jawatan plaintif atas terma-terma yang dinyatakan dalam kedua-dua penghakiman persetujuan tersebut dan juga bersetuju terhadap perintah-perintah alternatif berhubung bayaran gaji tertunggak sekiranya defendan pertama gagal mematuhi terma-terma penghakiman-penghakiman berhubung pengembalian kedudukan jawatan tersebut (lihat perenggan 11–12).

(3) Selanjutnya mahkamah juga berpuas hati bahawa tiada pematuhan oleh defendan pertama meskipun pada hakikatnya terdapat perbincangan antara peguam plaintif dan peguam defendan pertama berhubung bagaimana surat tawaran kepada plaintif patut dibuat untuk memasukkan terma-terma perintah persetujuan tersebut, selepas plaintif memperoleh penghakiman kedua (lihat perenggan 13).]

Notes

For cases on application for stay of execution of judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6423–6469.

For cases on consent judgment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4064–4065.

Cases referred to

Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd [2005] 1 MLJ 57 (distd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

J & C New Poly Catering Sdn Bhd v TTMP Bakun Consortium Sdn Bhd (Malayan Banking Bhd, garnishee & Anor) [2006] 1 MLJ 587 (distd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (refd)

Penang Port Commission v Kanawagi s/o Seperumaniam [1996] 3 MLJ 427 (distd)

Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 MLJ 705 (refd)

Zainuddin bin Muhammad v Atsco Ltd & Anor [2003] 1 MLJ 369 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 57

Shankar RP (Asnani and Francis Teron with him) (Thomas, Shankar Ram & Co Advocates) for the plaintiff.

Jubilant Austinway (Sim Hui Chuang & Lim Lip Sze with him) (Zaid Ibrahim & Co Advocates) for the defendant.

Azrin bin Ahmat (Idris & Co Advocates) for the garnishee.

Abdul Aziz Abd Rahim J:

[1] This is the first defendant's appeal against my decision in encl 73 dismissing the first defendant's application for stay of execution and restraining order pending appeal to the Court of Appeal against my decision in encl 43.

[2] The background facts (encl 73) are as stated in my grounds of judgment in respect of encl 43.

[3] After hearing counsels and having read the written submissions by counsels on encl 73, I decided to dismiss the application and refused to grant stay or restraining order to the first defendant.

[4] I now gave my reasons for that decision.

[5] As I have said earlier, in its application in encl 73, the first defendant is seeking an order for stay of all execution of proceedings to enforce the garnishee order absolute dated 11 January 2008 pending the disposal of the first defendant's appeal against the garnishee order absolute. Further and in the alternative the first defendant is seeking an interim injunction order be granted against the plaintiff/judgment creditor from dissipating or dealing with the garnishment sum paid by the garnishee on 14 January 2008 pursuant to the garnishee order absolute. And further and in the alternative the first defendant is also seeking a mandatory injunction order be granted against the plaintiff/judgment creditor to compel him to return the garnishment sum he received from the garnishee pursuant to the garnishee order absolute within seven days of the order.

[6] The grounds stated in the first defendant's application for the stay and injunctive reliefs are: Firstly the first defendant has filed an appeal in the Court of Appeal against the garnishee order absolute. Secondly, the plaintiff/judgment creditor is unemployed and does not have a source of income. Thirdly, there is a real danger that the money paid to the plaintiff/judgment creditor will be dissipated and the plaintiff would not be able to reimburse the same to the first defendant in the event the first defendant succeeds in the appeal. Fourthly, the money need to be preserved and protected from being dissipated or utilised pending the disposal of the appeal. Fifthly, the first defendant has a strong and stable financial standing and is able to satisfy any judgment or order of the court given in favour of the plaintiff. Sixthly, there are special circumstances exists to justify the grant

of the stay order of execution and justice of the case tips in favour of granting the reliefs sought by the first defendant.

[7] The plaintiff opposed the first defendant's application in encl 73 and had filed affidavit in opposition.

[8] Before I proceed further, it should be placed on record that at the hearing of encl 73, learned counsel for the first defendant conceded that the first defendant did not file any affidavit in reply to oppose the plaintiff's affidavit in opposition. However learned counsel intimated to the court that despite that, the first defendant for the purpose of encl 73 denied, and did not accept, everything that was said or asserted in the plaintiff's affidavit in opposition.

[9] I now return to the first defendant's application in encl 73. Learned counsel for the first defendant submitted written submission dated 21 January 2008.

[10] The law as to stay of proceedings or execution is too well known to require any citation of any authorities. The law may be briefly stated that the filing of an appeal is not a ground for the granting of the stay: s 57 of the Courts of Judicature Act 1964. The applicant must show special circumstances and that special circumstances must relate to the enforcement of the judgment: *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49.

[11] In arguing special circumstances in this instant application learned counsel for the first defendant pointed out that the second consent judgment contains new or additional or alternative orders, in particular order (6) for the payment of back wages until 2012. He submitted that this should not be the case as the first consent judgment had been drawn up and perfected; and in the first consent judgment there is no order or judgment for back wages for the entire period of contract up to 2012. Also he said such order entitled the plaintiff to full wages for the next five years (until 26 January 2012) without having to work for it. It was submitted that the plaintiff's application in encl 23 though couched as enforcement of judgment was in fact an application for variation of the first consent judgment. Learned counsel submitted that such application ought not to be made. There is no jurisdiction for such application. Citing the Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, learned counsel argued that the court was functus officio after the first consent judgment. He submits that *Hock Hua Bank Bhd* was followed by the Court of Appeal in *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2002] 1 MLJ 57.

[12] On the legal principle as to functus officio, I agree with the learned counsel for the first defendant that the court is functus officio after making the first consent order and such order cannot be varied or altered except for limited purpose under the slip rule. However in my view that principle applies only in cases where one party to the order or judgment opposes any application to amend or alter the judgment or order by the other party. But in cases where all parties agree or consented to the order to be altered or varied I do not think that the court is prevented from exercising its inherent jurisdiction to resolve the disagreement or dispute between the parties by allowing the parties to alter or amend the order. In *Zainuddin bin Muhammad v Atsco Ltd & Anor* [2003] 1 MLJ 369, the Court of Appeal held that, 'It is trite law that a consent order cannot be varied unless with the agreement of the other party or parties affected by it. Neither can it be set aside unless the conditions are met'. And in *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705, the Court of Appeal also held that 'an order made by consent in the absence of fraud, can only be varied by consent ...'. Therefore I do not agree with learned counsel for the first defendant's submission that the first consent judgment cannot be varied if the parties to it have agreed to the variation. In this instant case, the first defendant had consented to the variation (as alleged by the first defendant) or deemed to have consented to it because the first defendant did not object to the application or filed any affidavit in opposition to oppose it.

[13] The next argument by learned counsel for the first defendant to persuade the court that there is special circumstances in this instant application is that there is very limited jurisdiction to grant reinstatement or damages at common law. It was argued that if the plaintiff had been wrongfully dismissed and the plaintiff had sued in damages at common law then the quantum is limited to the pay which would have been earned by the plaintiff had the proper period of notice been given. In my opinion it is too late in the day for the first defendant to raise this argument to oppose the first or the second consent judgment. This argument ought to have been raised the first time in the plaintiffs application in encls 3 and 8 when it came up for hearing or when the plaintiff filed its summons in chambers in encl 23. However at this point, the first defendant already agreed to the reinstatement of the plaintiff on the terms stated in the two consent judgments and have also agreed to the alternative order as to the payment of backwages in the event the first defendant failed to comply with the terms of the judgments as to the reinstatement.

[14] As to the compliance with the first and second consent judgments by the first defendant, I am satisfied that there was no compliance despite the fact that there has been discussions between the plaintiff's counsel and the first defendant's advocates as to how the offer letter to the plaintiff should be

drawn up to incorporate the terms of the consent order, after the plaintiff had obtained the second consent judgment. There were three points of compliance which the first defendant must comply to satisfy the judgment. The first is that the letter of offer by the first defendant under the two consent judgments must incorporate the terms as to the benefits and allowances (including salary payable) which the plaintiff was entitled to under the MAPA agreement 2004–2007 and which agreement that first defendant had agreed being binding on it. Second, the letter of offer must be sent directly to the plaintiff. Thirdly, the original letter of offer by the first defendant dated 4 October 2007 issued pursuant to the first consent order must be reissued to the plaintiff directly by the first defendant incorporating all the terms agreed in the consent judgment within seven days from the date of the second consent judgment. The particulars of non-compliance were disclosed in the plaintiff's affidavits in support of his application in encls 23 and 43. The first defendant did not challenge the facts deposed in encl 23 and the affidavits in support thereof. The first defendant therefore cannot now say that the facts or statements in the affidavits are not true or that it did not agree with them. In this regard I would say that order (6) in the second consent judgment becomes final when the plaintiff has shown to the satisfaction of the court that the first defendant's failure to comply within the specific time provided in the order.

[15] With regard to the preservation of property or subject matter pending the disposal of the first defendant's appeal, I find no merits in the argument by the first defendant's counsel. The authorities cited by the first defendant's counsel to persuade the court on this point namely *J & C New Poly Catering Sdn Bhd v TTMP Bakun Consortium Sdn Bhd (Malayan Banking Bhd, garnishee & Anor)* [2006] 1 MLJ 587 and *Penang Port Commission v Kanawagi s/o Seperumaniam* [1996] 3 MLJ 427 are distinguishable from this instant application on the facts. In those two cases no consent judgment is involved.

[16] As to the justice of the case and balance of convenience, it is pertinent to note that the plaintiff's prayer in order (6) of the consent judgment is in the alternative: that is either the first defendant reemploys the plaintiff on the terms agreed in the consent judgment, the reinstatement of whom the first defendant has agreed to, or the first defendant may instead of reemploying the plaintiff pays the back wages which also has been agreed to by the first defendant. The choice or the exercise of the option is clearly on the part of the first defendant. From the conduct and action of the first defendant in this instant case, it appears to me that the first defendant is reluctant to reemploy the plaintiff (whose reinstatement the first defendant had agreed to) on the agreed terms of the consent judgment. This reluctance on the part of the first defendant can be inferred from the first defendant's conduct in dilly dallying

the offer letter to the plaintiff on the ground of technical interpretation of the terms contain in the MAPA agreement 2004–2007 as to whether the plaintiff is being posted or being transferred to Miri on him being reinstated under the consent judgment.

[17] For the above reasons I dismissed the first defendant's application in encl 73 and refused to grant the orders prayed for with costs to the plaintiff.

Application dismissed.

Reported by Sally Kee